February 28, 2006

Minerals Management Service
Attn: Rules Processing Team
381 Elden Street
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Herndon, Virginia 20170-4817

RE: RIN 1010-AD30, Alternative Energy-Related Uses on the Outer Continental Shelf

To Whom It May Concern:

These formal comments are filed in response to Minerals Management Services' Advance Notice of Proposed Rulemaking (ANPR) dated December 30, 2005 on Alternate Energy-Related Uses on the Outer Continental Shelf (RIN 101-AD30). These comments can be captured in four key recommendations:

I. Clarify the limited nature of rights in the oceans that may be accorded to private parties by MMS;

II. Think in terms of ecosystem-based management and develop regulations in the context of ocean zoning;

III. Incorporate criteria that give substantial weight to projects that will reduce greenhouse gas emissions; and

IV. Involve all affected parties and interests at all stages from development of the proposed regulations through removal of facilities.

The first three concerns address the program area of "Access to OCS lands and resources". The fourth addresses the program area listed as "Coordination and consultation".

I. The MMS regulations should make clear that neither Congress nor the Department of the Interior (MMS) has authority to grant "ownership" or "sea tenure" to private interests.

Minerals Management Service has embarked on a process designed to authorize a host of new stationary uses of the oceans. The regulations for which you seek advance guidance are likely to lead to fixed placement of wind farms and tidal energy plants. The ANPR also seeks guidance regarding conversion of offshore oil and gas platforms to other uses

including offshore, deep-water aquaculture. Authorization of stationary facilities in the sea, by implication, requires exclusion of many (and in some cases all) other uses within a defined boundary. To prevent sabotage or terrorism, some of these facilities may require exclusion zones effectively eliminating unrelated vessel traffic including commercial and recreational fishing and boating. Once investments are made by industry to install any of the new uses anticipated by the new regulations, investors may come to expect protection of "rights" to sea tenure that have not existed previously.

The regulations should make explicit that property rights to the oceans differ radically from property rights to land. Sea tenure historically encompasses a narrower bundle of rights than land tenure. Where public property exists on land, the US Constitution allows Congress not only to manage that land, but also to declare it available for transfer (sale, grant, etc.) to private entities. The seas, however, are not public property, and Congress may not convert the commons to private ownership nor dispose of ("alienate" in legal terminology) rights to the sea.

Nations have dramatically expanded their claims to the right to manage and control uses of the seas (first from a 3 to a 12 mile territorial sea, then to extended rights to contiguous zones, the continental shelf, and finally exclusive economic zones 200 nautical miles from the coastline). But the US and most other nations have studiously avoided overt claims of state ownership or public property rights to the seas. Under Article 56(1) of the 1982 Law of the Sea Convention, coastal states have sovereign rights to make rules and regulations governing economic exploitation of the EEZ including "production of energy from the water, currents and winds." It is important to distinguish between sovereign rights or the exercise of *imperium* (authority) and *dominium* (property rights). Coastal states have authority to regulate exploration and exploitation of the subsea and superjacent waters, but they do not have and cannot exercise *dominium* (property rights). This distinction is critical in a time when scholarly and lay literatures carelessly speak of "ownership" rights and allow private property concepts to creep into ocean space.

The MMS' experience in offshore oil and gas leasing has not impeded investment and development. With the expansion of fixed facilities on the seabed, MMS should be vigilant to avoid creating false impressions that permits (licenses, easements, or right of ways) create property rights to the sea. The ANPR anticipates issuance of licenses, easements and rights-of-ways. These must be carefully crafted and limited so that they do not exceed the Agency's authority nor undermine the public interest in protection of ecosystems. The regulations should make explicit the limited term and nature of any license, easement or right of way.

We caution the Department to avoid explicitly or implicitly seeking to assert *dominium* over the seabed, water column and ocean resources. We also urge the Department to make clear to those who may be granted permission to use ocean space, that the permission is a privilege and not a right. The length and term of use will be limited, and the government must retain the right to adjust the terms of the arrangement as new knowledge relevant to protecting the public trust and conserving ocean resources becomes available.

In developing regulations for the use of ocean space, the Department will need to develop principles of ocean governance that avoid endless battles among private entrenched interests, the rights of the public, and the government. Certainly, the US Government may exercise *imperium* (authority) to demarcate special zones where renewable energy facilities may be permitted, access may be limited, and use will be regulated in order to avoid depletion or destruction of marine resources.

The contrast between *imperium* and *dominium* is not well understood by the community with the strongest interest in this set of regulations. The regulations will chart new waters and lay the foundation for proliferation of fixed developments in offshore waters. We recommend that MMS host some workshops to bring together academics, managers and stakeholders to discuss the nature of sea tenure as well as explore the questions raised in the ANPR regarding the appropriate legal mechanisms for authorizing renewable energy facilities.

II. Think in terms of Ecosystem-Based Management, and develop regulations in the context of ocean zoning and marine spatial planning.

This following discussion addresses questions 1 and 30 posed in the ANPR:

1. *Are there regulatory regimes, either in the U.S. or abroad, that address similar or related issues that should be reviewed or considered as MMS moves forward with the rulemaking process?*

30. *...what other efforts could be undertaken at this early stage of program development?*

Placement of long term fixtures on the seabed and in the water column raises concerns of competition and conflict among existing as well as new uses. In order to reduce conflict, MMS should examine examples of ocean zoning and marine spatial planning designed to separate incompatible uses and enhance ecosystem-based management.

The United States Commission on Ocean Policy (2004) and the Pew Ocean Report (2003) call for ecosystem-based management. Comprehensive ocean use plans and zoning might well prove useful, even essential, to achieving ecosystem-based management. MMS should study the ocean zoning system developed for marine areas of Belgium, The Netherlands, Germany, and the United Kingdom. China is already implementing sea use management legislation passed in 2001, and the United Kingdom is considering marine legislation that would require marine spatial planning to reduce conflicts among users of marine areas and resources. As you know, wind energy development has advanced much more rapidly in the North Sea with Denmark perhaps in the lead. MMS should review and learn from all of the countries that have extensive

experience in siting wind and tidal energy; some of these are now looking to broaden their management into more comprehensive planning and management of ocean regions.

MMS should track and study the legislation proposed for ocean resource management in Massachusetts and work closely with Massachusetts and other states that have committed to ocean protection policies. While California does not have comprehensive spatial marine planning, its Marine Life Protection Act is leading to creation of the essential building blocks of spatial planning by designation of networks of marine protected areas (marine conservation areas, marine parks, and marine reserves).

The Great Barrier Reef Marine Park in Australia provides the largest and longest term example of regional marine spatial management. Permits for activities such as alternative energy development would only be allowed within a general use zone. We need planning to determine areas where renewable energy facilities are feasible and appropriate. This is likely to be best done in the context of regional marine spatial planning with participation of all stakeholders from the outset.

We have been involved in a working group on Ocean Ecosystem-Based Management: the Role of Zoning under the auspices of the National Center for Ecological Analysis and Synthesis (NCEAS), www.nceas.ucsb.edu . This Working Group is examining marine spatial management systems and developing materials to help policy makers and managers understand and design comprehensive ocean zoning. We would be pleased to provide MMS with additional information, guidance, contacts and references.

The recommendation to develop regulations for renewable energy facilities and other ocean uses within the context of ocean zoning should not be used to delay approval of energy sources that help the US move away from dependence on fossil fuels. But neither should the urgency to develop these become an excuse for further fragmentation of governance and sectoral thinking that undermines any prospect for ecosystem-based management.

III. Incorporate criteria that give substantial weight to projects that will reduce greenhouse gas emissions.

9. How should MMS balance existing uses within an area with potential wind and current energy projects?
11. What criteria (e.g. environmental considerations, energy needs, economics) should MMS consider in deciding whether or not to approve a project? ...

The US needs to switch from greenhouse gas producing energy sources to renewable energy sources to reduce what the President has called “our addiction” to fossil fuels. We need only review the 2004 Arctic Climate Impact Assessment to realize that greenhouse gas emissions are causing dramatic, negative impacts in the Arctic and for Arctic residents. The science is near unanimous and demonstrates the urgency of switching to renewable energy as well as reducing demand and increasing energy efficiency.

In light of these facts, MMS should select methods of authorizing wind, tidal and other renewable energy facilities in the oceans as rapidly as possible while addressing any and all environmental impacts. MMS's regulations should incorporate techniques of measuring climate impact reduction from competing proposals for renewable facilities as well as give substantial weight to providing permits for projects that wean us from fossil fuels. Delay in developing fair and equitable permitting schemes will likely lead to mistrust of MMS due to your role in leasing offshore tracts for oil and gas development.

> *32. Would the establishment of Federal/state cooperatives for targeted areas be useful?...should we solicit comments on which areas of the OCS should be included or excluded from the program?...*

Close cooperation between federal and state agencies is essential to overcome the current fragmentation of government authority that impedes ecosystem-based management and delays comprehensive spatial management. The areas most likely to be good candidates for wind and tidal energy facilities are already mapped by the innovators in the renewable energy field. These sites and the larger ecosystems likely to be affected by them should be targeted for early establishment of cooperative arrangements to advance renewable energy projects and reduce agency conflicts and confusion. Selection should be done within the context of marine spatial planning and zoning (see response to questions 1 and 30 above).

IV. Involve all affected parties and interests at all stages from development of the proposed regulations through removal of facilities.

This section is responsive to the ANPR's question 33 under Coordination and Consultation:

> *33. What are the critical stages (e.g. site evaluation, application, competitive sale) for consultation with affected parties?*

All affected parties or stakeholders including other Federal agencies, state government, local government, and non-governmental organizations should be involved in the process from the initial rulemaking and continue to be involved throughout all stages of the process, NEPA review, and siting. They should continue to be involved in developing monitoring and evaluation protocols and in eventual abandonment and removal of facilities.

MMS can look to the model of marine sanctuaries such as the Channel Islands NMS where an ongoing advisory council of stakeholders meets regularly to advise on policy, monitoring, research and evaluation. The comments above strongly recommend that siting of ocean facilities be conducted within the context of ocean planning and zoning to avoid incompatible uses, resolve conflicts and promote ecosystem-based management. Stakeholder involvement and participation is critical from the outset in order to reveal conflicts, identify problems and options, promote cooperation, and enhance compliance.

While national organizations and interests may more easily participate by commenting on the regulations, local and regional interests (e.g. fishermen, Chambers of Commerce, businesses, local and regional environmental groups) can only participate when meetings are held locally, funds are available for travel to public meetings at more distant locations, information is widely disseminated in an accessible format, and language barriers to participation are removed.

Sincerely,

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PLEASE NOTE: This comment is submitted by the individuals above. Affiliations are provided for informational purposes.